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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. DAVID GONZALES, Defendant and Appellant.	H024978 (Santa Clara County Super. Ct. No. CC1160691)

On July 13, 2001, 10-month-old Leonard N. was transported by ambulance to Santa Clara Valley Medical Center with injuries allegedly sustained as a result of falling off a bed. Leonard had been in the care of defendant David Gonzales at the time he was hurt. Leonard was eventually diagnosed as suffering from shaken baby syndrome. Defendant was arrested and charged with one count of felony child abuse (Pen. Code, § 273a, subd. (a)) and one count of being under the influence of methamphetamine (Health & Saf. Code, § 11550, subd. (a)), a misdemeanor. The jury found defendant guilty as charged and found true the allegation that he had personally inflicted great bodily injury on the victim, a child under five years of age. (Pen. Code, §§ 12022.7, subd. (d), 1203, subd. (e)(3).) Defendant admitted enhancement allegations related to a prior felony conviction. The trial court sentenced him to 18 years in state prison for the felony and 90 days in jail for the misdemeanor.

On appeal, defendant contends that the trial court erred in denying his motion for a mistrial. We shall affirm.

A. FACTS

Defendant and Irene Rosas began dating in December 2000. They moved in together around March or April 2001. Baby Leonard was Irene's[1] son. He was about three months old when Irene and defendant first started dating. Leonard lived with his father and visited Irene on Irene's days off from work. The evidence was conflicting as to the frequency of those visits. Irene testified that visits took place at least every week. According to one police report, Irene had reported only three or four such visits between March and July 2001. Irene acknowledged that defendant would care for Leonard during his visits whenever Irene was called in to work or was sleeping.

Leonard's father testified that Leonard's behavior began to change around late March or early April 2001. The child would awaken abruptly from a sound sleep and scream. The behavior got worse over the next couple of months. Irene also observed changes in her son's behavior. He was fussy when she picked him up from his father's house. She said that this behavior had begun shortly before the July 13, 2001 incident. She also said that defendant had previously complained that Leonard cried a lot.

In July 2001, defendant and Irene were living temporarily with defendant's sister, Rita Gonzales and Rita's three young daughters. On the evening of July 12, 2001, Irene picked Leonard up from his father's house and brought him back to Rita's to spend the night. He was crying when she picked him up, but he had calmed down by the following morning. Leonard was happy and appeared well on the morning of July 13, 2001. Some time around midday defendant put him down for a nap. The child was dressed in a tee shirt and diaper at the time. Irene did not actually see defendant settle the baby on the

[1] We shall refer to the witnesses by their first names for purposes of clarity. We intend no disrespect by so doing.

bed or observe the child sleeping. Irene said their usual routine was to give Leonard a bottle, which he would take before falling asleep. Since Leonard had only a regular bed to sleep on, Irene had always stressed the importance of putting pillows around the baby so he would not fall off.

After Leonard went down for his nap, Irene left to go to the grocery store. Rita, who was just returning home from work, asked to go along. The drive to the store took no more than 10 minutes. Irene and Rita ran in and picked up a few things. As the two were leaving the store, Rita received a call from defendant on her cell phone. Defendant was upset, crying, and yelling. He said that Leonard had fallen and was not moving and that he was turning blue. Rita told defendant to call 9-1-1. When Irene and Rita arrived home, defendant was alone in the house holding the baby. The other children were in the backyard playing. Defendant was frightened and crying. The child was wearing only a diaper. He was wrapped in a towel and was wet, as if he had just been bathed. He was limp and unmoving and his eyes were rolled back in his head. Rita laid the baby on the floor and the group waited for the paramedics to arrive. While they waited, defendant explained that Leonard had fallen off the bed. Defendant apologized to Irene and said that he had not put the pillows around the baby to keep him from falling.

The paramedics arrived at approximately 2:47 p.m. Defendant was anxiously waiting for them on the lawn. The paramedics found Leonard unconscious but breathing on his own. They concluded that Leonard's condition was life-threatening and transported him to the hospital for immediate medical attention. Rita and Irene had remained calm but defendant was anxious and excited. David Rose, one of the paramedics, testified that of the adults present, only defendant seemed to understand the severity of the situation. Defendant told Rose that he had been in the kitchen preparing a bottle for the baby when he heard a thud in the bedroom. Defendant took Rose into the bedroom and showed him the bed. Rose's initial impression was that it would be unusual for a child to sustain the type of injury Leonard seemed to have sustained by falling from

that bed. Rose's report to the police stated that he had observed the pillows on the bed arranged in a way to prevent a baby from rolling off.

During the investigation that followed, the police determined that Rita's house was built on a raised foundation, not a concrete slab. The floor of the bedroom where Leonard had allegedly fallen was covered in relatively new shag carpet laid over a half-inch foam pad. The distance from the top of the bed to the floor was approximately 18-20 inches.

Irene went to the hospital. Defendant stayed behind. Leonard was difficult to arouse and did not respond appropriately to stimulation. His physical examination revealed hemorrhages of both retina, a bruise on the right side of his scalp, a bruise on his back below his right shoulder blade, and several dime-sized bruises on his chest. The bruises on his chest did not look new. Their size and pattern were consistent with bruising from the fingertips of a hand. Both Irene and Leonard's father denied having observed any bruising on Leonard before the incident.

A CT scan of Leonard's brain showed an area of bleeding outside the brain (a subdural hematoma). The scan also had evidence of similar bleeding that had occurred in the past. Both findings were consistent with traumatic injuries; the first one must have occurred within the past 24 hours and the other was at least four weeks old. The CT scan also showed that the child's brain had atrophied so that it was smaller than it should have been.

Dr. Catherine Albin, a pediatrician and expert in recognizing child abuse, was Leonard's treating physician while he was in the hospital. Dr. Albin concluded that Leonard fulfilled all the criteria for shaken baby syndrome. The results of his physical examination and diagnostic tests showed that he had suffered repeated traumatic injury. A fall from the bed could not explain his injuries. Dr. Albin testified that such falls were quite common and usually resulted in no more than a crying baby. Even when parents were sufficiently concerned to bring their children in to be examined after such an event

injuries are rarely discovered. Serious injuries from such falls are exceptionally rare. The serious injuries that do result from these types of falls are usually skull fractures and are not associated with subdural hematomas or retinal hemorrhages. Although there was evidence that Leonard might have suffered a skull fracture, the CT scans and X-rays were equivocal and Dr. Albin could not say for certain whether there was a skull fracture. She was certain that the child had suffered some impact to his head based upon the bruising she observed on his scalp.

Dr. Albin also explained that Leonard's change in behavior in the recent past was consistent with the diagnosis of shaken baby syndrome. Repeated shaking causes damage to the brain that in turn makes the child irritable. Normal infant colic and fussiness tends to peak around two and one-half to three months of age and then subside. Leonard's fussiness seemed to begin around three months and got worse rather than better over time, suggesting that his behavior was not normal infant fussiness.[2]

Defendant was taken into custody at around 9:30 p.m. on the day Leonard had been hurt. Defendant had refused to respond when the police knocked on the door of Rita's house so that Rita had to come home from work to open the door. Defendant was found sitting on a bed in the dark. He was sweating profusely. A test of his blood showed that he had ingested methamphetamine sometime within the preceding 24 hours. An expert testified that symptoms of methamphetamine use include sweating, confusion, irritability, and emotional instability.

Rita's seven-year-old daughter, Leandra testified for the defense. She explained that she was in her bedroom on the day Leonard was injured and that she had not gone outside at all. She went into the kitchen at one point and saw defendant making a bottle for the baby. Before returning to her room, she looked into her sister's room and saw

[2] Leonard was discharged after four days in the hospital. At the time of trial it was not known if the injuries would affect him permanently.

Leonard asleep on the bed. About five minutes later she heard a bump, returned to her sister's bedroom, and saw Leonard on the floor with defendant standing over him. On cross-examination Leandra acknowledged that during the earlier foundational hearing she had said that she was outside playing on the day Leonard was hurt. In rebuttal, the prosecution offered the testimony of a police detective who had interviewed Rita in Leandra's presence. He had not excluded Leandra as he normally would have done because every witness to that point had said that the children were outside playing at the time of the incident. When he finally interviewed Leandra, Leandra claimed to have been inside. Her story was so confused and conflicting, however, that the detective suspected she was attempting to incorporate her mother's version of events into her own memory of what actually happened.

B. BASIS FOR THE NEW TRIAL MOTION

Prior to trial, defendant moved to exclude evidence that he had been convicted in 1999 of misdemeanor domestic abuse. Specifically, he sought to exclude evidence of a statement Irene had made to the effect that defendant had not come to the hospital with her because of outstanding warrants in a domestic violence case. The trial court granted the motion and excluded the evidence for all but impeachment purposes, admonishing the prosecutor instruct his witnesses and structure his inquiry to avoid permitting the evidence to be accidentally introduced.

At the end of her direct examination of Dr. Albin, the prosecutor asked the following question: "Can you give us a sense of [Irene's] demeanor both before and after you explained what the findings were." The defense attorney immediately objected on grounds of relevance. The trial court overruled the objection. Dr. Albin then responded: "Baby Leonard's mother was visibly upset. She was very upset to find out that her son had been hospitalized. Came up as quickly as she could to the room. And was very worried about all of the findings, and worried about whether or not he would recover. [¶] When she heard from me that it was my opinion that the baby was shaken and that was a

diagnosis already supported by the neurosurgeon and by the trauma surgeons who had seen him, she was incredibly angry. She was pacing the room, she was--"

Defense counsel objected again, this time citing lack of foundation. The court instructed the witness to testify as to what she had "actually seen, and let the jury draw conclusions from your description." The witness then went on:

"Baby Leonard's mother was visibly upset, angry, pacing, she revealed lots of issues with respect to her relationship with her boyfriend. She had indicated that she knew that he had had domestic violence--" Defense counsel immediately objected, the trial court sustained the objection and conferred with counsel at sidebar. The court ordered the answer to be stricken and instructed the jury: "Ladies and Gentlemen, there's a jury instruction that I will give you at the end, but it's appropriate at this point. [¶] Whenever I strike anything from the record, you're basically to treat it as though you never heard it. So as far as this last question and answer, I've stricken it. It is not in the record. Treat it as though you never heard it." The prosecutor terminated the line of questioning that had led to the improper response and concluded by asking Dr. Albin whether Irene had been present during the child's stay in the hospital. Immediately following the witness's response defense counsel began cross-examination.

Out of the presence of the jury defense counsel argued for a mistrial. The trial court responded that there was nothing to suggest that there was any collusion between the witness and the prosecutor and that it appeared that the witness just misunderstood the scope of the question that was asked. "There was an immediate objection which was appropriate. We discussed it. The evidence was stricken. I did admonish the jury to disregard it. And my feeling is that we have sufficiently addressed the situation to avoid the irreparable damage that the law would require for me to grant the mistrial. So the Court is going to deny the motion to grant the mistrial."

C. ISSUE

Was the witness's remark that Irene "knew [defendant] had domestic violence--" incurably prejudicial to the defense?

D. DISCUSSION

1. Standard of Review

A mistrial should be granted where the court determines that prejudice to the defense is incurable by admonition or instruction. (*People v. Hines* (1997) 15 Cal.4th 997, 1038.) Only when a party's chances of receiving a fair trial have been irreparably damaged is a mistrial appropriate. (*People v. Bolden* (2002) 29 Cal.4th 515, 555.) " 'Whether a particular incident is incurably prejudicial is by its nature a speculative matter, and the trial court is vested with considerable discretion in ruling on mistrial motions.' [Citations.]" (*People v. Hines, supra,* 15 Cal.4th at p. 1038.) We review the trial court's denial of a mistrial motion under the deferential abuse of discretion standard. (*People v. Ayala* (2000) 23 Cal.4th 225, 282.) We find no abuse of discretion here.

2. The Trial Court Did Not Abuse Its Discretion in Denying the New Trial Motion

Defendant argues that the witness's remark was incurably prejudicial because it suggested that defendant had a propensity to engage in domestic violence in a case where domestic violence was the central issue and it alerted the jury to defendant's criminal history. We disagree that the remark was as laden with prejudice as defendant contends.

Defendant cites *People v. Guerrero* (1976) 16 Cal.3d 719 for the position that mistrial is warranted where the prosecution has presented evidence of prior criminal acts similar to that for which the defendant is being tried. *Guerrero* involved a defendant accused of murdering a 17-year-old girl. The trial court permitted the prosecution to introduce testimony from another 17-year-old girl who claimed that defendant had raped her six weeks before the alleged murder. (*Id*. at p. 722-723.) The Supreme Court held that this testimony should have been excluded and that the instruction limiting the jury's use of the evidence could not erase the young woman's testimony from the minds of the

jurors. (*Id*. at p. 730.) Here, we have no comprehensible testimony on the subject, merely an inadvertent "he had had domestic violence--." The remark was incomplete and, on paper at least, does not convey much of substance. There is no way the jury could have known how the witness intended to finish the sentence. In any event, the remark is not anything like the offending testimony in *Guerrero*. The witness did *not* say that defendant had a prior conviction for domestic violence or that he had previously been arrested for domestic violence. Nor did she give a detailed description of a prior violent act, which is the reason the testimony in *Guerrero* was so prejudicial.

Defendant also argues that cautionary instructions are ineffective when a jury learns of a defendant's past criminal activities. (*People v. Bentley* (1955) 131 Cal.App.2d 687.) Again we stress that the remark did not necessarily reveal defendant's past criminal act. Even if it did, *Bentley* is distinguishable. In *Bentley*, a police officer testified to a conversation in which the defendant denied the offense at issue in that case. The officer then stated: " 'And I went on to question him about activities he had been involved in in 1942 when he had been a suspect in another case, and he denied this.' " (*Id.* at p. 689.) The appellate court determined that the officer's testimony was intentional and calculated to prejudice the defendant. The court noted that merely directing the jury to disregard the testimony was no "antidote for the poison that had been injected into the minds of the jurors." (*Id.* at p. 690.) We do not view the incomplete, inadvertent remark in this case as having so poisoned the minds of the jury. The remark was a tiny part of the witness's lengthy testimony and was unlikely to have weighed heavily in the jurors' minds even absent an instruction to disregard it. The witness took the stand around 11:30 that morning and was excused at 4:19 that afternoon. Her remark came at the end of direct examination, roughly three-fourths of the way through the doctor's lengthy testimony. When the court sustained the objection and admonished the jury, the court carefully avoided repeating the offending remark and instructed the jury to

disregard the question and the answer. The issue was never mentioned any time before or after. There is very little here that could have poisoned the minds of the jury.

Furthermore, the prosecution's case was very strong. Leonard had been fine when his mother left him in defendant's care to go to the store; he was non-responsive when she returned. Defendant's story that the child fell off the bed because defendant had failed to erect the pillow barrier is contradicted by the paramedic's observation of the arrangement of the pillows on the bed that day. The only witness for the defense, a seven-year-old girl, was severely discredited by the officer that interviewed her at the scene. More importantly, the treating physician provided uncontradicted testimony that Leonard's injuries could not be explained by a fall from the bed. The evidence is overwhelming that Leonard's injuries were caused by violent shaking. There was no evidence that anyone other than defendant could have inflicted those injuries. Further, Leonard's history of irritability, which was consistent with his having been shaken in the past, began around the same time defendant moved in with Irene. We conclude that under the circumstances the trial court did not abuse its discretion in denying the motion for mistrial.

E. DISPOSITION

The judgment is affirmed.

Premo, J.

WE CONCUR:

Rushing, P.J.

Elia, J.